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IN THE

Supreme Court of the United States

October Term, 1962.

No. 465

PRISCILLA ALDEN BEACH, a/k/a PRISCILLA A. HICKEY, Widow,

Plaintiff,

vs.

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (Successor to ROME TRUST COMPANY) and JOHNSON D. McMAHON,

Defendants.

BRIEF FOR RESPONDENT, JOHNSON D. McMAHON.

DONALD SPADONE,
JOHNSON D. McMAHON,
Counsel for Defendant-Respondent, Johnson D. McMahon,
American Block,
Rome, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1962

In the

Supreme Court of the United States

October Term, 1964

Priscilla Alden Beach, a/k/a Priscilla A. Hickey, Widow,

Plaintiff,

vs.

Oneida National Bank and Trust Company of Central New York (Successor to Rome Trust Company) and Johnson D. McMahon,

Defendants.

BRIEF FOR RESPONDENT.

Introduction.

The case is here on a petition by plaintiff for a Writ of Certiorari to the United States Court of Appeals, Second Circuit, to review a judgment of affirmance of two judgments entered against her on two separate claims, one after trial with a jury but terminated in a dismissal at the conclusion of the plaintiff's case and the other after trial without a jury.

The first cause was in the nature of a common-law claim for money damages resulting from an alleged conspiracy to defraud plaintiff of a life estate with the right of trial by jury. (It was not a claim of negligence and was not in the nature of an equitable claim such as upon an accounting.) See Pre-trial Order No. 1, paragraph 3, in the appendix attached to this brief.

The second cause was in the nature of an equitable claim to determine title to certain shares of stock held in a testamentary trust.

Plaintiff claims lack of due process, denial of right to jury trial and error by the Federal Court in applying the New York substantive law concerning fraud

Statement of Procedural Facts.

The action was commenced in June of 1958. Thereafter, motions to the jurisdiction of the Federal Court were made by the defendants. The motions were granted and the complaint was dismissed. This decision was appealed to the Court of Appeals, and reversed in part and sustained in part and the case was remanded for further proceedings (269 Fed. 2d 367). Answers were interposed in August, 1959, and further motions to the pleadings were made and denied pending pre-trial conferences. Examinations of the defendants and the plaintiff were held over a period of months during late 1959 and early 1960, principally at the convenience of the plaintiff and her attorney.

The case was first noticed on the Calendar, March, 1960. The notice was withdrawn by plaintiff since examinations were not complete. The case was again noticed for May, 1960. At this time last minute appeals by plaintiff were filed in the Appellate Division of the New York Supreme Court covering some of the issues determinative in this case. Over the objections of plaintiff, the case was put over until November, 1960, so that the State Court's decision could be known. (During the times hereinbefore mentioned an accounting proceeding in the estate of plaintiff's mother was being taken through the Oneida County Surrogate's Court [N. Y.]. The District Court's dis-

missal of plaintiff's cause of action for an accounting in the Federal Court was affirmed by the Court of Appeals decision, 269 Fed. 2d 367.)

Plaintiff unsuccessfully petitioned the Court of Appeals for mandamus against the decision to put the case over to November, 1960.

Plaintiff did not proceed expeditiously to argue the appeal in the State Appellate Division. Since the decision therein was not entered until December, 1960, this case went over the November 1960 term for the same reason that it went over the May 1960 term.

The case was next noticed for trial at the April 1960 term of District Court. At this term a jury was drawn. After an all day conference in the Judge's chambers wherein plaintiff had local counsel as well as counsel of record, the jury was dismissed. The issues and theories of liability were determined to be in such a clouded state as to require an amended complaint which counsel for plaintiff agreed to furnish.

An amended complaint was served, answered and a pre-trial conference thereon was ordered by the District Judge for September, 1961. Plaintiff's counsel refused to attend such a conference until coerced to do so when the Judge made a conditional order of dismissal. Thereafter a conference was held and a pre-trial order was made defining the causes of action, dividing them as between jury and non-jury, ordering the non-jury trial for November, 1961, and the jury trial for January 9, 1962. Each trial resulted in judgment for the defendants. The cause tried before the jury was dismissed at the close of plaintiff's case for failure to present an issue of fact or *prima facie* proof of a cause of action.

An appeal was taken to the Court of Appeals on the whole case by the plaintiff. The judgments below were affirmed from the bench and judgments with costs were entered June 29, 1962.

Statement of Facts on the Merits.

Carrie A. Beach, mother of plaintiff, died November 15, 1951, testate. Her will, probated February 26, 1952, established a trust for plaintiff consisting of 495 shares of common stock of the Beach Lumber Company, Rome, New York, and one-half the residue of her estate. The Oneida National Bank and Trust Company of Central New York (then Rome Trust Company), one of the defendants, was named trustee, and was directed to pay the income to plaintiff for life with remainder over (Exhibit 1, p. 156 of Appendix in Court of Appeals).

Letters of trusteeship were issued June 11, 1953, and the first regular income remittance was made to plaintiff on September 16, 1953 (Exhibit 14, p. 174). The income between testatrix's death and establishment of the trust was adjusted and paid following the final accounting in the estate and decree of judicial settlement entered February 27, 1959 (testimony, pp. 108, 109).

The Beach Lumber Company did not pay a dividend between 1949 and 1958 on its common stock. The trustee held less than 25 per cent of the outstanding shares of the company (p. 96), which is a closely held family corporation. Plaintiff's nephew is president and he and his sister hold a controlling interest. The trustee defendant brought no action to compel a dividend or to dissolve the corporation. The trustee's efforts to sell the stock failed.

This defendant, Johnson D. McMahon, was the attorney for the estate of Carrie A. Beach, as well as attorney for the trustee in the matter of this trust prior to 1958.

He has represented the Beach Lumber Company, the Rome Trust Company and various members of the Beach family for many years. He has been a director of the Rome Trust Company and its successor since 1923 and a director of the Beach Lumber Company since 1953. He has never been the attorney for the plaintiff, she having been represented during the period in question here by various other attorneys (pp. 128, 129). This defendant has never actively managed the Beach Lumber Company. (Cross examination omitted in Plaintiff's Appendix to the Court of Appeals at foot of p. 85.)

Contentions.

1. Plaintiff had her day in court with due process and her right to trial by jury was not abrogated other "than according to the rules of the common law."

2. Plaintiff failed to establish a prima facie case in fraud against this defendant and presented no question of fact for the jury. The District Court properly dismissed the first cause of action at the conclusion of plaintiff's case.

3. The District Court properly ruled that the title to the 495 shares of common stock of Beach Lumber Company remained in the trustee subject to the testamentary trust established by plaintiff's mother.

ARGUMENT.

I.

Plaintiff had her day in court with due process and her right to trial by jury was not abrogated other "than according to the rules of the common law."

A. Due Process.

The course of a case in the courts is generally determined by the plaintiff within the rules of procedure and subject to the rules of procedure.

Defendants have the right and their attorneys have the duty to defend a case within the rules of procedure.

It is submitted that nothing more nor less occurred in this case. Plaintiff set the general course and the defendants defended all within the rules of procedure. The plaintiff failed in her case and the defendants succeeded not as a result of procedural developments. Plaintiff failed on the merits of her claims. If there was a deviation from normal procedure in this case it was not caused by the defendants and did not prejudice plaintiff.

The statement of procedural facts recited in plaintiff's petition, once shorn of counsel's opinions, conjectures, suspicions and conclusions begging the question, show no lack of process and it is submitted show no lack of *due* process.

Plaintiff appears to claim lack of due process as follows:

1. Separate trials of jury and non-jury claims.
2. Refusal of trial judge to permit immaterial argument between counsel on question of who caused delay.

3. Denial by various judges including Court of Appeals to assign outside judge.

4. Bias and prejudice of both Federal District judges of the Northern District of New York.

The first two should need no comment. The latter two seem to be based only on the fact that in some of their intermediate decisions and orders, the Judges disagreed with plaintiff's position. This should need no comment.

If the Trial Judge erred in the application of substantive law in this case it would not be a lack of due process within the meaning of the Constitution. It would be an error in law correctible on appeal. Here the Court of Appeals affirmed.

B. Right to Jury Trial.

The management of estates and trusts has always been under the supervision and jurisdiction of courts of equity, probate or ecclesiastical courts. In probate and accounting procedures no right to a jury trial existed at the time of the adoption of the United States Constitution and no such right exists under New York law. New York Civil Practice Act, §425.

Plaintiff included in her case a claim of fraud or conspiracy to defraud and her counsel demanded a jury trial of this cause of action. A common-law claim of fraud is subject to the right of trial by a jury.

At the last pre-trial conference, plaintiff's counsel dictated and consented to paragraph three of the pre-trial order which defined the first cause of action as a "conspiracy to defraud plaintiff of her life estate * * *" (see paragraph 3, p. 2a).

On the trial plaintiff failed to produce proof of fraud or conspiracy. Her case tried to the jury was dismissed (see Point II below). There is nothing unusual in this. Verdicts are directed and cases are dismissed at the conclusion of the affirmative case regularly in our courts (e. g., *Dulion v. S. A. Lynch Enterprise* [C. A. 5], 53 F. 2d 568, cert. den. 285 U. S. 540). This does not give rise to a claim that the right to a jury trial has been denied. It may raise a question of substantive law and constitute error correctible on appeal. Here, the Court of Appeals affirmed.

Plaintiff's counsel argued and continues to argue that the burden of proof fell on the defendants as it would if they were accounting fiduciaries in an equity court justifying their accounts and actions. To obtain a jury plaintiff pled common-law fraud but on trial wanted to try her case as though she were a respondent filing objections in an accounting proceeding.

Plaintiff's complaint made serious allegations of wrong doing against this defendant. The trial showed that the allegations were ficticious.

Incidentally, plaintiff has never sought an accounting of the trust in the New York Surrogate's Court.

II.

Plaintiff failed to establish a prima facie case in fraud against this defendant and presented no question of fact for the jury. The District Court properly dismissed the first cause of action at the conclusion of plaintiff's case.

The first cause in this case which was tried with a jury is an action or claim in fraud. (Paragraph 3 of Pretrial Order No. 1, page 2a, this brief.)

The elements of fraud are representation, falsity, deception, *scienter* and injury. *Hackner v. Morgan*, 130 Fed. 2d 300; *Channel Master Corp. v. Aluminum Limited Sales, Inc.*, 4 N. Y. 2d 403.

There is no evidence in the record of a representation made by the defendant to the plaintiff and no rulings of the Trial Judge excluding any offered evidence of a representation. Counsel for plaintiff has argued that there is a presumed or implied or inferred representation as a result of some relationship between Johnson D. McMahon and the plaintiff. The cases cited by counsel for plaintiff and listed below are distinguished on the facts.

Butler v. Prentiss, 158 N. Y. 49, and cases cited therein;

In re Hubbell's Will, 302 N. Y. 246, and cases cited therein;

Standard Machinery Co. v. Duncan Shaw Corp., 208 F. 2d 61;

Globe Woolen Co. v. Utica Gas & Electric, 224 N. Y. 483.

In each case cited there was a very close relationship between the actual parties themselves and there were various actual representations made either openly or by silence coupled with a duty to speak. Hence, the cited cases do not support a presumption or inference as here contended

by the counsel for plaintiff. In each case cited there was a representation of a fact or the failure to disclose a fact.

There is no evidence in the record of anything said to or done toward the plaintiff falsely by either defendant and no rulings of the Trial Judge excluding any offered evidence of such act. Again, counsel for plaintiff argues that this can and should be presumed or inferred because of some relationship between the parties. In each of the cases cited by plaintiff, there was a misrepresentation either overtly or by silence. In each case the plaintiff acted under some mistake of fact known by the fiduciary defendant.

There is no evidence in the record that the plaintiff was deceived in any way by action or word of either defendant and no ruling of the Trial Judge excluding any offered evidence of any such deception. It seems obvious from the whole case that plaintiff was somehow deceived concerning the wealth of her mother and father, but neither defendant gave her reason to entertain any "Great Expectation."

There is no evidence in the record of *scienter* or evil intent by either defendant against the plaintiff and no ruling of the Trial Judge excluding any offered evidence of such a state of mind. Plaintiff did testify that certain inquiries of hers went unanswered, but such is at most a scintilla of evidence of *scienter* and hardly proof thereof in a fraud action.

Perhaps most striking here is the complete absence of any evidence from which a jury or a Judge could ascertain that the plaintiff suffered injury and, if any, to what extent. Counsel for plaintiff questioned an officer of the corporate defendant concerning the 495 shares of common stock of Beach Lumber Company held by the corporate trustee. The stock paid no dividends except $1 in 1959 and $1.25 in 1960. The officer testified to his unsuccessful efforts to sell this asset of the trust. (Omitted in Plaintiff's Appen-

dix.) He testified as to conversations he had had with the officers of Beach Lumber Company concerning the possible payment of dividends. (Omitted in Plaintiff's Appendix.) The exhibits in evidence (year end financial statements of Beach Lumber Company, p. 160 *et seq.*, referred to p. 101 *et seq.*) do not show any corporate wrongdoing in failing to declare and pay dividends. The exhibits show that most of the gain in net worth during the years in question came, not from operations, but from the sale of real estate because of a relocation of the lumberyard.

There is no evidence that either defendant influenced the dividend policy of Beach Lumber Company. (That company is not a party to this suit.) The Trial Judge repeatedly questioned the relevancy of the offered line of proof concerning the ability or requirement that Beach Lumber Company declare dividends. However, he allowed the evidence to be presented. The Trial Judge did exclude an independent accountant's opinion concerning whether or not the Beach Lumber Company could or should have paid dividends over the years in question. The ruling appeared to be based on lack of relevancy and on failure of counsel to make his question specific enough for understanding (p. 144).

Plaintiff submitted no evidence or proof concerning damages or injury. Counsel argued (p. 145 *et seq.*) as he had in the complaint and in other papers in this case that the fact that the trust did not provide a sum sufficient for plaintiff's needs or desires was proof of damage. This would make strange law.

There is no evidence in this record that anyone was unjustly enriched and no evidence that this defendant, Johnson D. McMahon, received anything of value or any advantage.

The burden of proof of establishing fraud is on the plaintiff. *Lynch v. Gibson*, 254 App. Div. 47, aff. 279 N. Y.

636: "Fraudulent acts will not be presumed nor can they be based merely on suspicion, conjecture or doubtful inference." *Lowendahl v. B. Y. O. R. R. Co.*, 247 App. Div. 144, 158. "Fraud will not be presumed in the absence of proof of facts from which concealment or imposition may be inferred." *Matter of Peltz*, 14 Misc. 2d 18; *Matter of Phillips*, 293 N. Y. 483, 491.

Plaintiff failed to prove a prima facie case on the trial of this action.

III.

The District Court properly ruled that the title to the 495 shares of common stock of Beach Lumber Company remained in the trustee subject to the testamentary trust established by plaintiff's mother.

Concerning the second cause of action, this defendant is not a party in interest. Reference is made to the memorandum decision of the Trial Judge set forth as an appendix to the petition of the plaintiff, page 15a, which, it is submitted, correctly determines the question.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD SPADONE,
JOHNSON D. McMAHON,
Counsel for Defendant-Respondent, Johnson D. McMahon,
American Block,
Rome, New York.

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Appendix 1a

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APPENDIX A.

UNITED DISTRICT COURT.

NORTHERN DISTRICT OF NEW YORK

PRISCILLA ALDEN BEACH, a/k/a Priscilla A. Hickey, Widow,

Plaintiff,

against

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (Successor to Rome Trust Company) and JOHNSON D. MCMAHON,

Defendants.

Civil No. 7116.

Pretrial Order No. 1.

A pretrial conference was held on November 6, 1961, pursuant to the order of this court of May 10, 1961 for the purpose of considering ways and means of expediting the trial and facilitating the orderly presentation of proof. The plaintiff appeared in person and by Harold Blodgett and Robert L. Collins, her attorneys. Defendant Rome Trust Company appeared by Attorney James Griffin. Defendant McMahon appeared in person. After a conference, discussion, agreement and consideration, it is ORDERED—

1. That the trial of the second cause of action, set forth in plaintiff's amended complaint, shall be held on November 9, 1961 at the Federal Court House in the City of Utica, New York.

2. That the trial of the first cause of action in plaintiff's complaint shall commence on January 9, 1962 at 11 A. M. at the Federal Court House in the City of Utica, New York.

3. The issue of the first cause of action is defined as a conspiracy to defraud plaintiff of her life estate as created by the last Will of Carrie A. Beach, deceased. Money damages is the relief requested.

4. Within ten days from the date of this order, the plaintiff shall list in writing the names of the officers and directors of the Rome Trust Company with whom the defendant McMahon is charged in paragraph 9 of the complaint with having "conspired, combined and confederated with * * * to defraud plaintiff of her interest in the assets of the family fortune and of her one-half interest in her mother's estate."

5. Within ten days from the date of this order, the plaintiff shall set forth in writing "* * * the circumstances constituting fraud * * * with particularity."

6. If the plaintiff intends to offer proof of loans to defendant McMahon in accordance with paragraph 13 of the complaint, plaintiff within ten days shall state in writing the dates of and the amounts of said loans. If no such proof will be offered, plaintiff shall state such fact in writing within the above time period.

7. Defendant McMahon shall make available to the plaintiff upon the trial of this action the minute books of the Beach Lumber Company containing the minutes of the meetings of the stockholders and directors of said company from 1949 to 1960. Said defendant shall also produce as above profit and loss statements and yearend statements of the Beach Lumber Company from 1949 to 1960.

8. Defendant Rome Trust Company shall make available to the plaintiff upon the trial of this action books containing the minutes of meetings of the stockholders, board of directors and trust committee of said trust company covering the period from 1949 to October 8, 1958. Said defendant shall also make available as above its ledger sheets showing the details of any and all loans made by said company to the Beach Lumber Company and to defendant McMahon during the above time period.

9. Defendant McMahon will make available to the plaintiff upon the trial of this action his office copy of a Will of Carrie A. Beach dated prior to February 3, 1950.

10. Within twenty days from the date of this order, the plaintiff shall list in writing the documents or writings which will be offered as a part of plaintiff's affirmative case. Such list shall describe the writings, sufficiently for their identification.

11. All documents or writings, listed as required in the last preceding paragraph, shall be deemed authentic, genuine and no objection to their admission because of lack of foundation therefor shall be made unless within ten days after the receipt of said list the defendants shall enumerate in writing the specific documents to which objection as to authenticity, genuineness or foundation shall be made.

12. The only assets of the Estate of Carrie A. Beach involved in this litigation are 495 shares of common stock of the Beach Lumber Company.

13. The writings, referred to and required herein, shall be signed by the attorneys for the respective parties required to furnish same. The original of such writings shall be filed in the Clerk's office within the time period prescribed and copies thereof shall be mailed to the Court and served upon the attorneys for the opposing party or parties.

14. Plaintiff and her counsel have agreed that any notices and communications required to be served by the Clerk upon plaintiff or her counsel may be mailed to Harold Blodgett, Esq., 408 State Street, Schenectady, New York, and all communications and legal papers by Court or counsel for defendants may be likewise so served.

STEPHEN W. BRENNAN
United States District Judge.

Dated: November 9, 1961.